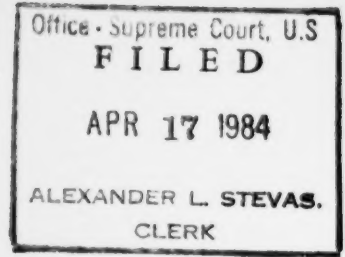


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83 - 1738



No. ...-....
IN THE
Supreme Court of the United States

October Term, 1983

JASON PHILLIPS, ALMA LYN PHILLIPS,

Petitioners,

vs.

MICHAEL J. HOWARD, ANN HOWARD, LUCIUS F. FOSTER,

Respondents.

**Petition for a Writ of Certiorari
to the Court of Appeal, Second
Appellate District, State of California.**

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Questions Presented.

1. Did the California District Court of Appeal violate the Fourteenth Amendment of the Constitution, both substantively and procedurally, and deprive Petitioners of their home without due process of law by:

(1) Decreeing that Petitioners had no vested right to an equity of redemption and a foreclosure proceedings terminating such equity.

(2) Decreeing that Petitioners had no vested right to a foreclosure and statutory right of redemption after foreclosure as required by the statutory laws of California.

(3) Decreeing that Petitioners equitable title to their home was subject to an absolute forfeiture and defeasance?

(4) Decreeing, retroactively, and without notice to Petitioners, that the California courts had the right to predetermine judicially whether or not Petitioners would have lost their home even had there been a valid foreclosure sale and right of redemption.

(5) Decreeing that Petitioners had no contractual right to redeem their home because of a subjective and hidden reservation by the other party to the contract; thus repudiating the objective theory of contract law.

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**Petition for a Writ of Certiorari
to the Court of Appeal, Second
Appellate District, State of California.**

Opinions Below.

The opinion of the Court of Appeal, State of California, Second Appellate District, Division Three, filed November 22, 1983, an unpublished decision, is contained in APPENDIX I, hereof. The Memorandum of Decision of the trial court, The Superior Court of the State of California, for the County of Los Angeles, filed May 8, 1981, is contained in APPENDIX II. Relevant portions of the Findings of Fact and Conclusions of Law of the trial court are contained in APPENDIX III.

Jurisdiction.

The judgment of the Court of Appeal, State of California, Second Appellate District, Division Three, is dated November 22, 1983, and was entered on the same date. The Petition

for Rehearing to said District Court of Appeal was denied December 13, 1983. The Petition for Hearing before the Supreme Court of the State of California was denied January 18, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Constitutional Provisions.

Constitution of the United States, Amendment XIV,
Section 1:

“* * *; nor shall any State deprive any person of life,
liberty, or property, without due process of law; * * *”

Statement of the Case.

Forty days after Petitioners believed they had refinanced the second deed of trust on their home by a “friendly” foreclosure sale with Respondents-Defendants (the “Howards”, or sometimes husband, “Michael Howard”), the Howards served on Petitioners a three day notice to quit their home and deliver possession to the Howards, and their nightmare and odyssey through the courts of the State of California began. Although the courts found that Michael Howard had committed wilful fraud by the charade of pretending the foreclosure sale was a refinancing with the secret intent of claiming legal title as the absolute owner, the appellate court denied Petitioners their vested right to a valid foreclosure sale, and equity of redemption on the unprecedented theory that Petitioners would have lost the property in any case.

On July 30, 1975, Petitioners, husband and wife (Plaintiffs), showed Respondents, husband and wife (the “Howards”) through Petitioners’ Los Angeles home for the purpose of having the Howards refinance the second deed

of trust obligation of \$7,995.00, then delinquent.¹ The meeting was arranged by Respondent-Defendant ("Foster"), a licensed real estate broker.² The Howards agreed to refinance and on July 31, 1975, Foster and Plaintiff visited the holder of the second deed of trust and had him deliver an assignment thereof to the Howards by delivering as payment the Howards' cashier's check for \$7,995.00. On August 1, 1975, Plaintiffs paid Foster a loan commission of \$1,000.00, as agreed upon.

On August 5, 1975, Plaintiff-husband and Michael Howard met Foster and they all drove in Foster's car to the offices of the existing trustee under the second deed of trust to effect the refinancing by having a "friendly" foreclosure sale to the Howards.³ Prior to the sale, Plaintiff-husband and Michael Howard executed a substitution of trustee document substituting Foster as the new trustee. Foster proceeded to conduct the sale and bid in the amount of \$7,995.00

¹As of July 30, 1975, a notice of default under the power of sale in the second deed of trust had been recorded and the entire amount of \$7,995.00 was due. A notice of default under the power of sale in the first deed of trust to a savings and loan (the "S&L") had also been recorded for 7 delinquent monthly payments of \$503.00. However, on July 17, 1975, Plaintiffs had paid \$904.00 in delinquent taxes and deposited with the S&L a \$2,000.00 cashier's check, and the S&L granted in writing a grace period to November 14, 1975 to bring payments current and the holder of the second deed of trust in writing removed the house from foreclosure sale until September 16, 1975.

²Foster and Michael Howard had formerly been partners in the second deed of trust business and both Howards were licensed real estate brokers at the time. The trial court found that Foster acted as an agent for Plaintiffs.

³Foster testified that he and Michael Howard had agreed that if any third party appeared and bid, an unlikely circumstance since the sale was set forward, Foster would cancel the sale and the Howards would extend the note.

on behalf of the Howards.⁴ Thereafter Foster prepared and recorded a trustee's deed to the Howards.

Following the sale, Plaintiffs remained in uninterrupted possession and enjoyment of their home until September 14, 1975, at which time the Howards delivered to Plaintiffs the three day notice to quit the premises. On September 25, 1975, the Howards filed a summary unlawful detainer proceeding against Plaintiffs for possession and the rental value. Trial was held on July 8, 1976 and judgment was had against Plaintiffs for possession and rental value of \$1,175.00 per month from September 20, 1975. Plaintiffs' payment obligation under the first deed of trust was \$503.00 per month. The rental value was based on the testimony, placed in evidence in this trial, of the Howards' expert witness that

⁴Under California law then in effect, a mortgage, whether in the traditional form or the form of a deed of trust, required judicial foreclosure and the mortgagor (or trustor under a deed of trust) was vested with a year equity of redemption unless the mortgage or deed of trust contained a contractual provision entitling the holder to effect a foreclosure in a private sale and the holder elected to have a private sale. See California Civil Code, Sections 2924-2924h and California Civil Code, Section 2903.

If a private sale was used, California Civil Code, Sections 2924-2924h provided that (in lieu of a subsequent equity of redemption), a notice of default in a prescribed form must be recorded in the County Recorder's office and that the mortgagor shall have three months thereafter to cure the specified default. If the default was not cured within three months, a sale could be made if notice thereof was posted and published at least 20 days before the date of sale. In view of the three month period to reinstate the mortgage, if possible, and said period plus the 20 day notice of sale, no other redemption period was prescribed under nonjudicial foreclosures.

In *Garfinkle v. Superior Court* (1978) 21 Cal.3d 268, 146 Cal.Rptr. 208, 578 P.2d 925, app. dismd. 58 L. Ed. 2d 340, 99 S. Ct. 343, reh. den. 59 L. Ed. 2d 66, 99 S. Ct. 886, the California Supreme Court ruled that nonjudicial foreclosures under present statutory procedures do not violate the Fourteenth Amendment on the theory that the remedy is created by private contract and there is no "state action". Plaintiffs do not contest this decision, and it is manifestly inapplicable in this case. There was no power of sale in the deed to the Howards, and Plaintiffs' vested property rights were terminated with no foreclosure sale and redemption right.

the value of the property as of September 1975 was between \$129,000.00 and \$140,000.00. The trial court found a value of \$85,000.00, about \$12,000.00 less than the cost; and contrary to all other evidence, except the opinions of Foster and Michael Howard. Plaintiffs vacated the home during October of 1976, while an appeal and recorded lis pendens were in effect in the unlawful detainer action, Plaintiffs on May 7, 1977 initiated this action in equity to have the trustee's deed to the Howards declared a mortgage and for an accounting.

The essential matter in issue and litigated at the trial was fraud as the Howards, and particularly Michael Howard, who handled the matter, repeatedly contended that they had no knowledge whatsoever that a refinancing was intended. At one stage, the trial court stated that the sole issue is which party is he going to believe. However, a related subissue was whether or not Michael Howard assisted or directed Foster in preparing an option proposal dated July 30, 1975 for presentation to Plaintiffs and also saw a counteroffer dated July 31, 1975 by Plaintiffs to Howard.⁵ Michael Howard denied any knowledge of these documents, however, the trial court found that the offer was presented at his instructions and that he saw the counteroffer. The trial court found that Michael Howard never informed either Foster or the Plaintiffs of his secret reservations, even though he went through the pretext of agreeing to the consummation of the refinancing. However, the trial court found that Michael Howard advised Foster of his rejection of the counteroffer, but that Foster did not advise Plaintiffs of this

⁵The July 30 offer was signed by Foster and Plaintiffs refused to sign under "Accepted". The counteroffer prepared July 31 in the office of Plaintiffs' attorney was also signed by Foster and signed by Plaintiffs under "Accepted". These documents are discussed in more detail in APPENDICES I through III.

“... for the purpose of keeping a potential refinancing with defendants or others alive.”⁶ Both the trial court and appellate court ignored the objective theory of contract law and held that the wilful fraud in the form of the secret reservations defeated formation of any meeting of the minds and contract.

The decision of the trial court (APPENDICES II and III), in juxtaposition to the customary means of invoking equity and defenses thereto, was to the effect that Plaintiffs’ remedy at law was adequate because of laches, a failure of tender and Plaintiffs’ financial inability to make tender.⁷ The Court of Appeal correctly ignored all of these reasons in its decision as they are unsound and erroneous.⁸

However, the Court of Appeal did accept in substance the trial court’s theory in Finding No. 2 (APPENDIX III)

⁶See Finding of Fact No. 24, APPENDIX III. The trial court also found in Conclusion of Law No. 3 that Foster “... had not earned” the \$1,000.00 commission paid him. In holding there was no actionable fraud because Plaintiffs suffered no monetary damages, the Court of Appeal ignores this. APPENDIX I.

⁷APPENDIX III, Conclusion of Law No. 12.

⁸There was absolutely no factual or legal basis in support of these defenses. The Howards did not assert laches as an affirmative defense, the issue was not litigated, and the parties were in continuous and overlapping litigation since September 25, 1975, 11 days after service of the notice to quit. At the time of commencement of this action on May 16, 1977, a notice of appeal was still in effect as to the unlawful detainer action and Plaintiffs had a *lis pendens* recorded. In the unlawful detainer action, the trial court refrained from considering the issue of fraud, stating that he hoped such fraudulent conduct did not occur, but holding, properly, that such issue must be tried in a separate proceeding in equity.

The theory of tender is also erroneous as Plaintiffs could not otherwise refinance as the Howards held legal title of record and claimed absolute ownership. In Finding of Fact No. 52 (APPENDIX III), the trial court found that the Howards never demanded or requested payment and that from mid-September of 1975, they claimed absolute ownership. Further, since an accounting was involved, the law is that tender is not required. The obligation would be offset from the rentals due Plaintiffs; a substantial amount in this case.

that: "On or about August 5, 1975, the reasonable value of the property in question did not substantially exceed the principal balances of the liens or encumbrances against the property in an amount that any satisfactory or feasible refinancing could be had for the premises."

The decision of the Court of Appeal, wherein the dormant constitutional issue was first crystalized, departed markedly from the trial court decision, except for validating the trial court's view that the Plaintiffs' "... inability to refinance the property or to cure the defaults by other means was the real cause of their loss of the property."⁹

As to the issue of fraud and mortgage law, as distinguished from the issue of whether there was a meeting of the minds, the court in literal effect invoked a forfeiture and stripped Plaintiffs of their vested property rights to a valid foreclosure sale and an equity of redemption of some nature. It did so under two parallel theories.¹⁰ First the court stated the proximate cause of the loss of the home was not the fraud, it was the inability of Plaintiffs to refinance the property. In effect, the court pre-adjudicated whether or not the Plaintiffs would have been successful in keeping their home had a valid foreclosure sale occurred and a redemption period been granted.¹¹ Second, the Court of Appeal con-

⁹APPENDIX I (p. 17) of Official Opinion.

¹⁰Nowhere in its opinion did the court mention or consider the vested right of the Phillips under fundamental equitable law requiring a valid foreclosure sale and an equitable right of redemption.

¹¹Such issue was not litigated in-depth except that there was conflicting evidence as to the value of the property. The opinion recognizes that Plaintiffs offered no evidence of their income or other assets that might be used. This is because such matters were never properly in issue in this type of case in equity which is rooted in the concept that necessitous men are not, truly speaking, free men. See 59 C.J.S., Mortgages, Section 42, argued, *infra*, and holding that financial distress is a factor in proving a deed to be a mortgage.

cluded that since Plaintiffs suffered no damages,¹² there was no actionable fraud and Plaintiffs were not entitled to equitable relief.¹³

As to Plaintiffs' contract rights, although Plaintiffs and Foster proceeded to perform under the counteroffer which they assumed operative by substituting Foster as trustee and having him proceed with the sale, the Court of Appeal concurred in the trial court's finding that because of the secret reservations of the Howards, there was no meeting of the minds. Although Michael Howard had advised Foster that he rejected the counteroffer, his subsequent conduct manifested to both Plaintiffs and Foster an intent to refinance the property. Confusing the comprehensive law holding deeds absolute to be mortgages under various circumstances with the law of equitable mortgages based upon intent and in

¹²We accept that for purposes of this petition, the findings of the trial court on both the value of the home and issue of damages are conclusive. But, in the context of equity, some perspective may be gained in considering the distortion in reasoning of both courts. Plaintiffs paid a \$1,000.00 commission to lose their home and incurred a judgment against them for rent of \$1,175.00 per month compared to monthly payments of \$503.00, but Plaintiffs were said to have suffered no damages. Similarly, the cost of the home in May of 1974 was \$74,950.00 and Plaintiffs added a pool and deck for a cost of \$12,152.64; total cost \$92,075.64. But the trial court found a value of only \$85,000.00 on the theory of Foster and the Howards that it had appreciated but slightly. In other words, the trial court took into account the cost of the pool and deck as an encumbrance, but ignored it as adding value. To compound these capricious determinations, the trial court's Finding of Fact No. 3 that the aggregate of the liens against the property as of August 5, 1975 was, mathematically, \$84,047.69, because a third deed of trust secured by other property also was cleared by the sale of the other property, was ignored by the Court of Appeal which included this lien of about \$24,255.00 in substantiating a lack of equity. Both courts seemed determined to validate the observation of Charles Dickens on the law.

¹³The trial court did not deny equitable relief on these grounds, but merely held that, as Plaintiffs were barred from equitable relief because of laches, failure of tender, and the fact that they would have lost the house anyway, their only remedy was for damages, and there were no damages.

which a lender asserts the parties intended an admitted loan to be secured by real property, the court refused to declare the deed a mortgage on the theory that there was no contract.

As to the raising of the latent constitutional issue, we will proceed in reverse order. In the Petition for Hearing to the Supreme Court of the State of California, we pointed out that in equity it is a fraud to treat what is a mortgage as a sale because there was a deed absolute in form; citing *Peninsular Trading and Fishing Co. v. Pacific Steam Whaling Co.* (1899) 123 Cal. 689 and *Russell v. Southard*, 12 How. 139. We stated that the Fourteenth Amendment guarantees a mortgagor constitutional rights to foreclosure proceedings and an equity of redemption.¹⁴

In the Petition for Rehearing before the Court of Appeal, we pointed out that Plaintiffs had a vested right to a foreclosure sale and equity of redemption and these rights were protected by the due process provisions of the State and United States Constitutions.¹⁵

In Plaintiffs' briefs to the Court of Appeal before decision in which the issues of laches and a failure of tender, though erroneous, appeared to be the principal defenses relied on by the trial court, Plaintiffs repeatedly asserted their absolute vested rights to a valid foreclosure sale and equity of redemption and that the trial court by "judicial fiat swept away"¹⁶ these rights. We stated (Op. Br. p. 23): "Un-

¹⁴Petition for Hearing and Errata, p. 9, line 25 and Errata. The petition was denied.

¹⁵Petition for Rehearing, p. 20. Also see p. 15. This petition was denied.

¹⁶Op. Br. p. 23. We also pointed out that under the objective theory of contract law, a valid contract existed as the Howards allowed Plaintiffs to proceed with performance under the counteroffer without advising them of their secret intent (Op. Br. pp. 19, 20). And Plaintiffs noted that the question of whether Plaintiffs might have otherwise refinanced was never in issue and not litigated (Op. Br. pp. 30-32, Reply Br. pp. 10-11).

doubtedly one of the most fundamental rights of an owner of realty which secures a debt is the *right to retain title until the creditor complies with the foreclosure laws* and that included in this bundle of rights is the debtors equity of redemption. This would be applicable herein even as to statutory redemption after a foreclosure since no power of sale under a deed of trust could possibly have existed.”

We further stated (Op. Br. p. 25): “But, we would like to point out that this Court has implicitly found the existence of a debt and swept away the entire body of mortgage foreclosure laws and the right to an equity of redemption . . . ”¹⁷

Prior to the trial the basic issue was factual: Did the Howards have knowledge that a refinancing only was intended by the foreclosure sale so that Foster’s deed to the Howards would be declared a mortgage only? Nonetheless, it was plainly pointed out in Plaintiffs’ memorandum before trial that if the deed was a mortgage, the Howards could not divest Plaintiffs’ of title without proper foreclosure proceedings.

Following trial, Plaintiffs clearly pointed out their fundamental vested right to a foreclosure sale and equity of redemption in their notice of motion for new trial and supporting memorandum filed September 29, 1981. In these papers, the Plaintiffs stressed that the trial court (1) made errors that violently collided with fundamental equitable principles, (2) “invoked” a “forfeiture,” and (3) “demolished the cardinal rule” that foreclosure was required.

Plaintiffs stated:¹⁸

¹⁷Clk. Tr. pp. 273, 274.

¹⁸Clk. Tr. p. 278, lines 10-15, p. 279, lines 10-12. Plaintiffs also pointed out that a contract existed under the objective theory (Clk. Tr. pp. 282-3) and that the issue of whether Plaintiffs would have lost their home was not tried (Clk. Tr. pp. 291 and 293).

“Undoubtedly one of the most fundamental rights of an owner of property which secures a debt is the *right to retain title until the creditor complies with the foreclosure laws*. Included in this bundle of rights is the creditor’s equity of redemption. This would be applicable herein since no power of sale under a deed of trust could possibly have existed.”

* * *

“This Court has undertaken, by arbitrary judicial fiat, to strip the PHILLIPS of all of their rights under these statutes and the immense body of equitable law creating such rights.”

A hearing on Plaintiffs’ motion for new trial was held on October 13, 1981 and the matter was taken under submission. The Trial Court did not act on it and thus, after a specified time, it was deemed denied by operation of law.

ARGUMENT.

1. Why Review Should Be Granted.

The applicable portion of subparagraph 1(c) of the Supreme Court Rules provides in part that a review by writ of certiorari will be considered:

“When a state court . . . has decided a federal question in conflict with applicable decisions of this Court.”

It is submitted that the decision of the California Court of Appeal below, aborting a homeowner's right to a foreclosure sale and the right to an equity of redemption, and thus invoking a forfeiture, clashes squarely with decisions of this Court holding that such rights are vested property rights protected by the due process provisions of the Fourteenth Amendment.¹⁹ The decision in effect “buries” the relevant law of equity as it relates to mortgage foreclosures frozen into the Constitution.

And even if the view that the Plaintiffs had the burden of first proving they would in any event have been able to refinance the property is accepted as constitutionally sound, the decision violates procedural due process by its retroactive application. Plaintiffs had no notice.

Not only does the decision involve a fundamental federal question of due process, but the issue has a profound bearing on the personal financial lives of all homeowners. A majority of Americans own their homes and in most cases, not only is their home their most valuable asset, but most of these people have mortgage liens on their home and live

¹⁹If the reasoning of Plaintiffs in this petition is sound, it is clear that there is a fundamental federal question of vested property rights under the due process clause of the Fourteenth Amendment. Even a nonjudicial foreclosure sale challenged on due process grounds was held to present a substantial federal question. *Lawson v. Smith* (1975) 402 F. Supp. 851; *Garfinkle v. Wells Fargo Bank*, 483 F. 2d 1074 (C.A. 9th Cir. 1973).

with mortgage payments on a monthly oasis. We think it is fair to state that mortgage law, and subsidiary aspects related to such matters as foreclosure rights, redemptions, and refinancing, threads its way through the fabric of the personal financial lives of all these people.^{19a}

The decision is incomprehensible and a tragic miscarriage of justice. But it also obliterates existing mortgage and constitutional law insofar as it in effect holds that before a property owner can have a deed absolute procured by fraud declared a mortgage, such person must prove that he or she was in fact not in a distressed financial condition and also, virtually, that he or she probably did not have to refinance anyway.

This unprecedented renovation of law and its imprint on the due process provisions of the Fourteenth Amendment of the United States Constitution deserve this Court's deliberation to make clear for all courts and litigants, and homeowners, in general, their rights and obligations under mortgage law, when a refinancing occurs or is contemplated.

2. The Vested Rights of Plaintiffs Were Terminated by "State Action."

On August 5, 1975, Foster, acting on behalf of the Plaintiffs, deeded the home to the Howards, but the Plaintiffs continued in undisturbed possession to, and for over a year after, delivery of the notice to quit on them by the Howards on September 14, 1975.

At no time ever has there been a valid foreclosure sale, either judicially or by private sale. Manifestly the deed to the Howards, intended by Plaintiffs and Foster to constitute

^{19a}Numerous wage earners, small businessmen and farmers are all confronted with home refinancing problems upon loss of jobs or business reverses. This problem is aggravated by current novel and "creative" refinancing techniques and the impact of variable mortgages.

a refinancing arrangement and thus a security device, contained no power of sale provisions.

Clearly it was solely the action of the trial court, to the extent affirmed by the California Court of Appeal, that divested Plaintiffs of property rights they claim to be protected under the Fourteenth Amendment. This brings this case under *Shelly v. Kramer*²⁰ in which this Court stated:

“That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment, is a proposition which has long been established by decisions of this Court.”

That Michael Howard defrauded Plaintiffs of title to their home is clear. But the decisions of the courts of the State of California deprived Plaintiffs of their vested property rights.

3. The California Courts Have Deprived Plaintiffs of Their Vested Rights to an Equity of Redemption and Foreclosure Proceedings (Whether Strict Foreclosure or by Sale), and Their State Statutory Right of Redemption, as to Their Home, Without Due Process of Law.

Prior to the United States Constitution, the Courts of Chancery in England evolved the concept of an equity of redemption as a vested right in equity to redeem mortgaged property by payment of the debt after default in order to avoid the harshness of a forfeiture from the common law view that after default the mortgagee was vested with fee simple title. However, the equity of redemption right also resulted in the creation of a right to foreclosure proceedings in equity to terminate the mortgagor's equity of redemption;

²⁰334 U.S. 1 (1948).

otherwise, the land would always be subject to such claim.²¹

Thus at the time of adoption of the United States Constitution a mortgagor was vested with two related basic property rights; (i) an equity of redemption right and, a right to have some type of foreclosure proceedings (strict foreclosure of foreclosure by sale) before such equitable right was terminated.²²

As the cases of this Court discussed, *infra*, will show, these rights represent minimum due process standards embedded in the United States Constitution although the States have been given substantial latitude in adopting various theories (such as the title theory or lien theory) and providing other basic safeguards to the debtor; even though a strict foreclosure is still Constitutionally permissible.

Thus in *Russell v. Southard*, 12 How. 139, 13 L. Ed. 927 (1851), an action to redeem property on the theory that a deed absolute in form was a mortgage, this Court stated (145-148):

“To insist on what was really a mortgage, as a sale, is in equity a fraud, which cannot be successfully practiced under the shelter of any written papers, however precise and complete they may appear to be. In * * * *Morris v. Nixon*, 1 Howard 126, it is stated: ‘The charge against Nixon is substantially, a fraudulent at-

²¹See Glenn, Vol. 1, Mortgages, Deeds of Trust, and Other Security Devices (1943), Section 57 et seq. Foreclosure in the United States evolved into strict foreclosure proceedings in equity, in which no sale is required, or foreclosure by sale. But in either case, until the equity of redemption was terminated by a foreclosure, the mortgagor could redeem the property by payment of the debt.

²²This equity of redemption right which may not be terminated except by foreclosure proceeding in chancery, should be distinguished from the statutory right of redemption created by many states, (including California unless foreclosure is under a power of sale), and arising subsequent to foreclosure proceedings. Glenn, Vol. 1, Mortgages, (Etc.) (1943) Section 37.2.

tempt to convert that into an absolute sale, which was originally meant to be a security for a loan' * * *.

"It is suggested that a different rule is held by the highest court of equity in Kentucky. If it were, with great respect for that learned court, this court would not feel bound thereby. This being a suit in equity, and oral evidence being admitted, or rejected, not by the mere force of any state statute, but upon the principles of general equity jurisprudence, this court must be governed by its own view of those principles."

And in *Clark v. Reyburn*, 8 Wall. 318 (1869), this Court held the rule to be that, even in those states authorizing strict foreclosure, the constitution required a redemption right in the mortgagor.²³

²³The Court stated (8 Wall. 321-2):

"Can a decree of strict foreclosure which does not find the amount due, which allows no time for the payment of the debt and the redemption of the estate, and which is final and conclusive in the first instance, be sustained?"

The equity of redemption is a distinct estate from that which is vested in the mortgagee before or after condition broken. It is descendible, devisable and alienable like other interests in real property. 1 Pow. Mort. 252; 2 Greenleaf's Cruise, 128. As between the parties to the mortgage the law protects it with jealous vigilance. It not only applies the maxim 'once a mortgage always a mortgage', but any limitation of the right to redeem as to time or persons, by a stipulation entered into when the mortgage is executed, or afterwards, is held to the oppressive, contrary to public policy, and void.'

* * *

"The debt was regarded by the Chancellor, as it has been ever since, as the principal, and the mortgage as only an accessory and a security. The doctrine seems to have been borrowed from the civil law 2 Greenleaf's Cruise 77, 78; Spence's Eq. 601-603. After the practice grew up of applying to the Chancellor to foreclose the right to redeem upon default in the payment of the debt at maturity, it was always an incident of the remedy that the mortgagor should be allowed a specified time for the payment of the debt. This was fixed by the primary decree, and it might be extended once or oftener, at the discretion of the Chancellor, according to circumstances of the case. It was only in the event of final default that the foreclosure was made absolute."

In *Peugh v. Davis*, 96 U.S. 775, this court stated as to a deed, absolute in form, which was intended to be a mortgage (776):

“It is also an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has in a court of equity a right to redeem the property upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates. Its maintenance is deemed essential to the protection of the debtor, who, under pressing necessities will often submit to ruinous conditions, expecting or hoping to be able to repay the loan at its maturity, and thus prevent the conditions from being enforced and the property sacrificed.”

In Glenn, Vol. 1, Mortgages, (Etc.) (1943) § 67.2, the author points out that if the deed absolute is in fact a mortgage, “. . . the grantees only proper course is foreclosure.”, but notes that illogically, strict foreclosure has by some authorities been held proper here when not otherwise so. However, California law, Civil Code, Section 2903, then in effect, also vested Plaintiffs with a statutory right of redemption (as distinct from the equity of redemption terminated by foreclosure) for one year after the foreclosure.

In *Parker v. Dacres*, 130 U.S. 848, this Court noted that in *Clark v. Reyburn*, *supra*, this Court protected a redemption right only up to a strict foreclosure, but the court held that if a state statutory right to redeem after a foreclosure is in effect, it is a substantial property right protected by the constitution and “Courts of the United States sitting in equity.” Thus, not only were Plaintiffs vested, at a minimum, with an equity of redemption and the right to have a fore-

closure proceedings to terminate it, but under *Parker v. Dacres, supra*, they were vested with a right to foreclosure by sale and a statutory redemption right after foreclosure. See Note 4, *supra*.

Both the trial court and Court of Appeal deprived Plaintiffs of these vested property rights under the novel theory that Plaintiffs would have lost their home anyway and the concept that, under state law, actionable fraud, even in equity, requires proof of monetary damages irrespective of Plaintiff's constitutionally guaranteed rights under mortgage law.²⁴ Also, both Courts ignored Plaintiffs offer of tender of the debt due the Howards and an accounting as pleaded in both the original and first amended complaint in this action.

It is crystal clear that the friendly foreclosure proceedings on August 5, 1975, constituted a refinancing and a revamped mortgage. Plaintiffs continued in possession and the Howards asserted no claim of ownership for forty days. Plaintiffs have been deprived of any foreclosure in redemption right. To contend that the premature foreclosure on August 5, 1975 constituted on the same date a foreclosure proceedings and one-day redemption period right under the deed to the Howards is too illogical and absurd to require argument. The decree that, in lieu of a foreclosure right and equity and statutory redemption right, a judicial determination that

²⁴The issue of the value of the property and equity was examined and determined by both courts below as of August-September of 1975. The evidence in the record is that there was a substantial appreciation every year and as of the trial date, April 21, 1981, Michael Howard stated the value was over \$250,000.00 and Plaintiffs stated it was over \$400,000.00. The Court of Appeal in pages 15-16 of its opinion recognized and held irrelevant the fact that "... the property had substantially appreciated at the time of trial . . ."; thus ignoring not only constitutional law but an immense body of applicable state statutory and case law.

these rights were of no value to Plaintiffs anyway, is precisely the state action that violates the Fourteenth Amendment.²⁵

Such holding is unsupported by precedent and massacres the role of equity in mortgage proceedings.

4. Plaintiffs Were Denied Procedural Due Process of Law by Retroactive Application of a New Requirement.

If this Court accepts for any reason the view that the trial court could predetermine whether or not Plaintiffs would have retained title or otherwise benefited from a foreclosure sale and redemption rights, then Plaintiffs were deprived of procedural due process of law. The decisions below are unprecedented and the Court of Appeal is in effect imposing a new and novel judicial requirement retroactively.

Plaintiffs had no notice of this novel requirement and the issue was not tried in-depth. Nor was the issue of the value of the property tried in-depth, although introduced into evidence was the testimony of the Howards' expert witness

²⁵Nor does *Am-Cal Investment Co. v. Sharlyn Estates, Inc.* (1967) 255 Cal.App.2d 526, cited on page 16 of the Court of Appeal opinion, have any application.

That decision holds that in an action for specific performance of a land sale contract, a vendee must show, if he is relying on a loan for part of the purchase price, that he had a loan commitment. The decision is distinguishable as follows: (1) The vendee entered into an express contract knowing he had a certain time to obtain a loan; the Phillips vested title in the Howards thinking they consummated a refinancing giving them a year; (2) The vendee had 90 days, plus an extension to seek a loan; the Phillips were not advised of Howard's fraud and absolute claim of title until September 14-16, 1975 and had no time; (3) The vendee had a contract showing his right to purchase; the Phillips had no record title and no legal claim other than in equity; (4) The vendee had no claim to a foreclosure right and equity of redemption giving him some extension rights by law, the Phillips were vested with such rights if they could prove fraud; (6) The vendee's action was on an express contract; the Phillips' action for fraud, either actual or constructive, with different applicable rules."

that the fair market value of the property as of September of 1975 was between \$129,000.00 and \$140,000.00; that the cost, including the added pool and deck, was \$92,047.64 and that the Phillips valued the property over \$150,000.00.

Traditionally, and by numerous precedents, the necessitous condition of the debtor has been one factor tending to prove that a mortgage was intended. In 59 C.J.S., Mortgages, Section 42, the correct law is stated as follows:

“If the grantor of a deed absolute in form but alleged to have been intended as a security, was financially embarrassed at the time of its execution, being sorely pressed for money and, therefore, at the mercy of his creditor and unable freely to dictate the terms of his security, this circumstance will be considered as tending to show the intention to create a mortgage.”

5. Plaintiffs Were Denied Due Process by Termination of Their Contractual Right to Refinance.

Although more or less moot because of the finding of wilful fraud, we think it indisputable that under the objective theory of contract law, a contract for a refinancing was formed when Phillips and Foster caused the holder of the second deed of trust to assign it to the Howards and on August 5, 1975 caused a premature sale of the home to the Howards.²⁶ Michael Howard had not only failed to advise the Phillips of his rejection of the July 31, 1975 counteroffer, but he willfully kept secret from both the Phillips and Foster his secret intention of obtaining title for himself and his

²⁶APPENDIX III, Findings of Fact Nos. 23, 24 and 25.

wife only and not refinancing.²⁷

It is fundamental contract law that the conduct of the offeree (the Howards), in accepting the benefit of performance by the offeror without disclosing a subjective intent not to be bound, results in formation of a binding contract.²⁸

There is a surprisingly extensive body of law on deeds absolute as mortgages and it is clear that either fraud or an understanding that the transaction is a security device brings this law into operation. This law is treated in 58 sections in 59 C.J.S., Mortgages, Sections 18-70 and 51 sections in 55 Am. Jur.2d, Mortgages, Sections 32-82.²⁹

Conclusion.

For the above reasons, Petitioners submit that this case presents substantial and important current constitutional issues, affecting not only them, but numerous other, potentially vulnerable, homeowners in the United States and in need of home refinancing. This case thus calls for a review by this Court. Petitioners respectfully request, therefore, that a Writ of Certiorari be granted.

Respectfully submitted,

JOHN PATRICK HANRAHAN,

Attorney for Petitioners.

²⁷Even the notice of rejection by Michael Howard to Foster of the counteroffer cannot be imputed to the Phillips. Thereafter, Michael Howard saw on the trip to hold the trustee's sale on August 5, 1975 that the Phillips had no knowledge of his rejection and of course, Foster had no knowledge that Michael Howard had changed his mind and did not intend any refinancing. Further, such notice is not imputed if the agent engages in fraud and the Trial Court found that Foster had not earned his \$1,000.00 commission and proceeded forward under the theory that he was keeping a potential refinancing open. APPENDIX III, Finding of Fact No. 24.

²⁸Vol. 1 Williston on Contracts, Sections 22 and 22A. This was pointed out in Plaintiffs' motion for new trial and Opening Brief.

²⁹Although the divisions in this area occasionally refer to such as "equitable mortgages"; both courts below were confused on this. In its more strict sense "equitable mortgages" is treated in Sections 11-12 of 59 C.J.S., Mortgages and Section 11 of 55 Am. Jur.2d, Mortgages.

APPENDIX I.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Three.

Jason Phillips, Alma Lyn Phillips, Plaintiffs and Appellants, vs. Michael J. Howard, Ann Howard, Lucius F. Foster, Defendants and Respondents. 2d Civ. No. 67206 (Super.Ct.No. C 199920).

Filed: November 22, 1983.

APPEAL from a judgment of the Superior Court, Los Angeles County. Charles M. Hughes, Judge. Affirmed.

John P. Hanrahan for Plaintiffs and Appellants.

Kaplanis and Grimm and Trevor A. Grimm for Defendants and Respondents Michael J. and Ann Howard.

No appearance by Defendant and Respondent Lucius F. Foster.

SUMMARY

Appellants Jason and Alma Lyn Phillips (Phillips) appeal from the judgment entered below in favor of respondents Michael J. and Ann Howard (Howards) and Lucius Foster (Foster). The Phillips' action below sought the imposition of a constructive trust or alternatively an equitable mortgage. The gravamen of the Phillips' action was to recover possession of a single-family residence (the property) located at 7850 Oceanus Drive in Los Angeles, which the Howards obtained from the Phillips pursuant to a judgment in a separate unlawful detainer action.

The Phillips purchased the property and then experienced severe financial difficulties. With the assistance of Foster, the Howards acquired the property at a foreclosure sale at which time the Phillips believed they could repurchase the property pursuant to an agreement secured from the How-

ards. The trial court found the Howards had improperly failed to notify the Phillips that they had changed their minds prior to the foreclosure sale and had purchased the property without intending to allow the Phillips to reacquire it.

Despite appellants' contentions to the contrary, we have concluded that substantial evidence supports the trial court's finding that there was no meeting of the minds between the Phillips and the Howards concerning a repurchase agreement for the property and that there was therefore no expressed agreement to do so. We have further determined that substantial evidence supports the trial court's finding that the Phillips lacked the financial ability and resources to reacquire the property and that there was insufficient equity in the property for refinancing. Therefore, the appellants' lack of financial resources and not respondents' misrepresentation, was the cause of appellants' loss of the property. Accordingly, we affirm the judgment entered below.

FACTS

The Phillips acquired the property in 1974, for \$79,950. Although the exact details of the terms of the purchase by Phillips are unclear, it appears that a 10 percent down payment was made and that the balance of the purchase price was borrowed from San Fernando Valley Federal Savings & Loan Association (Valley Federal), secured by a first trust deed, and from First Western Development Corporation (First Western), secured by a second trust deed. The Phillips had apparently financed the 10 percent down payment by obtaining a loan from City Finance Plan, subsequently giving City Finance Plan a third trust deed on the property.

The Phillips also borrowed additional funds of \$12,152.64 from Valley Federal to make certain improvements, in-

cluding a swimming pool.

The Phillips encountered financial difficulties in late 1974, and early 1975. Valley Federal and First Western recorded notices of default on the property. Jason Phillips (Jason) negotiated with both Valley Federal and First Western for extensions and succeeded in postponing foreclosure proceedings. Valley Federal gave the Phillips an extension conditioned upon the Phillips' deposit of \$2,000 and 40 percent of the current taxes with Valley Federal.

Sometime in June and early July 1975, Jason and Foster¹ discussed the need to refinance the property. Foster, a real estate agent and acquaintance of the Phillips, asked Michael Howard (Michael) if he would be interested in purchasing the First Western note secured by the second trust deed and giving the Phillips the right to repurchase the note. The right to repurchase the property was provided for in a July 30, 1975, letter, written by Foster to the Phillips. But, the Phillips never assented to it by executing the letter.²

¹The trial court's conclusion of law no. 1 concluded that Foster was at all times the agent for the Phillips and not for the Howards.

²The July 30, 1975 letter provides as follows:

“July 30, 1975

“Mr. Jason Phillips
“7850 Oceanus Drive
“Los Angeles, Calif.
“90069

“Dear Mr. Phillips,

“Reference the foreclosure of your house scheduled for August 4th, 1975. Please be advised that I have arranged for an investor to bid in an amount equal to the second trust deed plus costs of sale. Indeed I am also arranging to purchase this trust deed prior to sale in order to facilitate gaining title.

“I extend to you an option for a period of 30 days to repurchase your house located a 7850 Oceanus Drive, Los Angeles California in the amount of the total bid plus interest at 10% on this amount and any advances that may have to be made to prior lien holders, plus the sum of One Thousand Five Hundred Dollars (\$1,500.00). The 30 day period of the option shall begin on August 4, 1976 [sic] [presumably 1975] and extend to and including September 4, 1975.

Apparently, Michael said he was interested in the transaction and on July 30, 1975, the Howard went to inspect the property. The Phillips showed the Howards through the house. Shortly after viewing the property, the Howards went to Gibraltar Savings and Loan to obtain a check in the amount of the then principal balance on the First Western note. Michael had the check made out to himself.

On July 31, 1975, Foster's letter of July 30, was presented to the Phillips and their attorney, Lawson Brown. The Phillips rejected Foster's offer contained in this letter. They had their attorney, Brown, prepare a counteroffer providing for a one-year option to repurchase.³

"If you shall be unable to repurchase this property within the 30 day period then I extend to you an additional 30 days to repurchase for an additional cost of One Thousand Five Hundred Dollars (\$1,500.00).

"At the end of that time if you have not repurchased the property the investor will then sell the house on the open market.

"This option is fully assignable by you to any person you may desire to nominate to purchase the property.

"In consideration of the above I am charging you a commission of One Thousand Dollars (\$1,000.00) said amount payable upon execution by you or your nominee of this option.

"SIGNED: [signature]
Lucius F. Foster

"ACCEPTED: _____
Jason Phillips"

(Emphases added.)

³Foster's letter to the Phillips, dated July 31, 1975 (plaintiff's exh. 8), was signed by Foster and the Phillips and states in part as follows: "In the event such investor acquires title to your property . . . he will forthwith convey the property to your nominee, taking back a note and deed of trust in the principal amount equal to his costs in acquiring said property plus the sum of \$1,500. Any such sum shall be payable interest only, monthly at the rate of ten (10%) per cent per annum, all due in one year. However, in the event third persons bid at the sale a sum in excess of the trustee's demand, said investor shall withdraw the property from sale and the note shall be amended by increasing the principal amount by the sum of \$1,500 and so as to require monthly payments of interest only at the rate of ten (10%) per cent per annum, with a one year due date. [¶] In consideration of the above, I am charging you a commission of One Thousand (\$1,000) Dollars, said amount payable upon execution by you or your nominee of this option."

Later on that day, Jason and Foster went to obtain assignment of the First Western note and second deed of trust to the Howards.

Foster testified that he showed the July 31 letter prepared by Brown to the Howards, but that the Howards stated it was not acceptable, although the original transaction (Foster's July 30 letter to the Phillips) was.

The evidence was conflicting with respect to the July 30 and July 31 letters. The trial court found (finding no. 14) that the July 30 letter was prepared by Foster and Howard using an option form arrangement to avoid possible usury problems and that the Phillips and their attorney Brown rejected the July 30 letter which was an offer made by the Howards. The trial court also found that the Howards rejected the "refinancing" plan contained in the July 31 letter prepared by the Phillips' attorney, Brown. The trial court's finding no. 31 was that "[n]o 'refinancing' agreement, understanding or arrangement was reached between plaintiffs and defendants from which the court can create an equitable mortgage or enforceable option contract."

The trial court further found that both Michael and Foster had failed to inform the Phillips that the Howards had rejected Brown's letter of July 31, 1975, and that Michael failed to advise the Phillips or Foster of the secret intent to keep the property for his own account, labelling Michael's actions as a "wilful misrepresentation."

On August 1, 1975, Foster and Jason Phillips went to Valley Federal. Foster took back the \$2,000 cashier's check previously deposited by Phillips to secure a postponement of Valley Federal's foreclosure proceedings and substituted his own check for \$5,276.17 to bring the Valley Federal note current. Foster later stopped payment on the check on August 4, 1975, although evidence shows that he never had

sufficient funds in the account to cover this check. By August 5, 1975, Foster had prepared a trustee document which substituted himself, doing business as Properties Unlimited, as the new trustee under the First Western deed of trust and had obtained Jason's signature. Michael later signed the substitution of trustees as the beneficiary after noting that Jason had already signed the same document.

On August 5, 1975, Foster conducted a trustee's sale of the property in the presence of Jason. Foster drove Michael, Jason and a third party to the offices of the original trustee for the trustee's sale. Based on the assumption that this was the last step in the refinancing transaction contemplated by the parties, Foster sold the property to the Howards. On August 6, 1975, Michael and Foster met. Foster prepared and signed a trust deed of the property to the Howards and the two went directly to the County Recorder's Office to record the documents.

On August 7, 1975, Foster wrote the Phillips about his stop payment order. On August 11, 1975, Valley Federal wrote to Phillips about the same matter.

On August 12, 1975, the Howards advanced \$5,276.17 to Valley Federal to bring the first trust deed note current. On this date, the Howards learned that Valley Federal would not honor Foster's check.

On September 5, 1975, Michael personally instructed Valley Federal to change the ownership to the Howards name. Michael did not tell the Phillips or Foster of the change.

There was no discussion between the Howards and the Phillips about whether the Phillips could remain in the possession of the property after the trustee's sale. On September 25, 1975, the Howards instituted unlawful detainer proceedings against the Phillips and were awarded a judgment

of possession plus damages on January 17, 1977.

Subsequently, the Phillips recorded a notice of lis pendens on the property. In October 1976, the Phillips vacated the property and filed an appeal from the unlawful detainer judgment. This appeal was pending at the time of the filing of the present action. Following a trial on the merits, a judgment was rendered in favor of the Howards and Foster. The Phillips filed a timely notice of appeal.

ISSUES ON APPEAL

1. Is there sufficient evidence to support the trial court's determination that the parties did not have a meeting of the minds on an agreement providing the Phillips the right to repurchase the property from the Howards? If the answer is in the affirmative, then there was no express agreement for such a repurchase and appellants' actions based on breach of contract and equitable mortgage must fail.

2. Is there sufficient evidence to support the trial court's findings that the Phillips did not have the financial ability to repurchase the property and that there was insufficient equity in the property to arrange a refinancing? If the answer is in the affirmative, there was no causal connection between the Phillips' loss of the property and Michael Howard's misrepresentations, such as to support an action in fraud. In the absence of any fraud, there would be no basis for equitable relief.

DISCUSSION

I

The Rule of Conflicting Evidence Applies Where Appellant
Contests the Sufficiency of the Evidence

"Where the evidence is in conflict, the appellate court will not disturb the verdict of the jury or the findings of the trial court. The presumption being in favor of the judgment

(see *supra*, § 235), the court must consider the evidence in the light *most favorable to the prevailing party*, giving him the benefit of *every reasonable inference*, and *resolving conflicts* in support of the judgment.” (6 Witkin, Cal. Procedure (2d ed. 1971), Appeal, § 245, p. 4236.) (Emphasis in original.)

“[I]n examining the sufficiency of the evidence to support a questioned finding, an appellate court must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion. Every substantial conflict in the testimony is, under the rule which has always prevailed in this court, to be resolved in favor of the finding.” (*Bancroft-Whitney Co. v. McHugh* (1913) 166 Cal. 140, 142.)

“[W]here the findings are attacked for insufficiency of the evidence, our power begins and ends with a determination as to whether there is *any* substantial evidence to support them; . . . we have no power to judge of the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence” (*Overton v. Vita-Food Corp.* (1949) 94 Cal.App.2d 367, 370.)

If substantial evidence is present to support the successful party’s judgment below, no matter how slight it may appear in comparison with the contradictory evidence, the judgment will be affirmed. (See 6 Witkin, Cal. Procedure (2d ed. 1971), Appeal, § 249, p. 4241.)

II

Substantial Evidence Supports the Trial Court’s Finding of the Lack of a Meeting of the Minds on a Repurchase Agreement

The evidence on the subject of the meeting of the minds of the parties was in conflict.

Jason testified that he had had discussions with several people concerning the refinancing of the second trust deed

note and that eventually he met with Foster and the Howards on July 30 at the property. Michael told Jason that they would loan the money and that Foster would handle it. Subsequently, Foster prepared a letter dated July 30, 1975, to Jason on his letterhead. Jason was upset by the July 30 letter because it only offered a 30-day loan since all discussions had been on a one-year loan basis. Jason had his attorney prepare another letter dated July 31, 1975. The Phillips and Foster signed the July 31 letter and Foster took it to the Howards. Foster did not say that Michael would necessarily agree or not agree to the terms of the July 31 letter.

Lawson Brown testified that the July 30 letter was unacceptable to Jason because Jason wanted a one-year loan and anything less was not acceptable. When the July 31 letter was given Foster, Brown felt the letter was acceptable for refinancing based upon Foster's statements. Brown testified that Foster told him that the one-year option period was agreeable with his investor, presumably the Howards. There was never any document signed by the Howards.

Michael Howard denies having a detailed discussion with Foster regarding the July 30 letter and that the first time he saw it was shortly before the unlawful detainer action. He denied that Foster ever gave him a copy of the July 30 letter. He denies being shown the July 31 letter by Foster and specifically stated that he never saw the July 30 letter during July or August 1975.

Based on this conflicting evidence, the trial court found that the Phillips had rejected the offer purported to be from the Howards in the July 30, 1975 letter and that Michael had rejected the July 31, 1975 letter containing the Phillips' offer to the Howards. The trial court found that no refinancing agreement had ever been reached between the parties. Based on our review of the record as outlined above,

we conclude that substantial evidence supports the trial court's findings.

It is elementary that in the absence of a meeting of the minds, that no express contract was consummated. Every contract requires mutual assent or consent. (Civ. Code, § 1550.) There must be an agreement on definite terms. (*McClintock v. Robinson* (1937) 18 Cal.App.2d 577, 582.) In the instant case, the failure of a meeting of the minds between the parties prevented the consummation of an express agreement.

Similarly, the failure of the parties to consummate an agreement also defeats the claim of an equitable mortgage. The equitable remedy of an equitable mortgage presumes the existence of an express agreement intending to create a lien even though not a legal mortgage. Thus, a trust deed which is defectively executed still could be enforced by the remedy of equitable mortgage. (See *Coast Bank v. Minderhout* (1964) 61 Cal.2d 311, 313-314.)

Thus, the trial court properly denied the Phillips' judgment pursuant to their breach of contract action and further properly denied the remedy of an equitable mortgage.

III

Substantial Evidence Supports the Trial Court's Finding that the Phillips Lacked the Financial Ability To Cure the Defaults and that the Property Had Insufficient Equity to Accomplish a Refinancing

At trial, Jason testified that he was a self-employed producer of documentary films and had been so employed for some 26 years. He indicated that he had suffered tremendous financial difficulties in the years 1974 and 1975, and that he was in default on the notes secured by the property. He offered *no* testimony on his income from self-employment and offered only generalities about his payments on debts.

His theory of saving the property was premised entirely on the equity in the property as a source from which he could borrow the funds to reacquire the property from the Howards.

The testimony as to the value of the property during the period in question was in dispute. While Jason opined that the value of the property was between \$150,000 to \$170,000 on August 6, 1975, he admitted that he had never had the property appraised. Foster and Michael, on the other hand, both testified that the value of the property was only \$85,000. The loans on the property were in excess of \$110,000 during the period in question. The trial court was entitled to accept the lower value expressed by Foster and Michael and reject the higher value offered by Jason. It is totally irrelevant that the property had substantially appreciated at the time of trial since the trial date was well past the period in which any agreement to repurchase the property was still effective.

Financial ability may be proved by showing the purchaser had liquid assets, property which could be sold, or an actual loan commitment, providing such resources are sufficient to close the deal. (See *Am-Cal Investment Co. v. Sharlyn Estates, Inc.* (1967) 255 Cal.App.2d 526, 546.) Here, the Phillips offered no evidence of any actual loan commitment from a financially responsible lending institution or investor. They also provided no evidence of any assets which would have suggested any source of funds to make the repurchase. Furthermore, they never performed any part of the arrangements set out in their July 30, 1975 letter, although Foster testified that he had made efforts to get them to do something.

Based upon our review of the record, there was substantial evidence to support the trial court's findings that the property lacked sufficient equity to accomplish the refinancing and that the Phillips lacked personal resources to cure the defaults on the notes secured by the property.

IV

In the Absence of Actionable Fraud, the Phillips Are Not Entitled to a Constructive Trust

The five basic elements of actionable fraud are: (1) misrepresentation, (2) knowledge of the falsity, (3) intent to defraud, (4) justifiable reliance, and (5) resulting damage. (*Stone v. Foster* (1980) 106 Cal.App.3d 334, 344, and 4 Witkin, Summary of Cal. Law (8th ed., 1974), Torts, § 446, p. 2711.)

All five elements must be proven if actionable fraud is to be found. If one of the elements is absent, it is fatal to recovery. (See *Ach v. Finkelstein* (1968) 264 Cal.App.2d 667, 674.)

Although the trial court found that Michael and Foster failed to advise the Phillips of the Howards' change of intention from refinancing to acquisition of the property, and that such failure caused the Phillips to refrain from seeking other refinancing plans to prevent foreclosure, Michael's actions did not cause the loss of property. It is evident to this court that even if Foster and the Howards had disclosed their true intentions to the Phillips at the time of the foreclosure purchase, the Phillips' inability to refinance the property or to cure the defaults by other means was the real cause of their loss of the property. Simply stated, the Phillips' theory of fraud fails in the absence of a clear showing that they had been damaged by the failure of the Howards and Foster to make the proper disclosures. In the absence of a causal connection, there were no damages proven.

A court in equity will grant a constructive trust where a property has been obtained by actual fraud. (See *Walter H. Leimert Co. v. Woodson* (1954) 125 Cal.App.2d 186, 189, citing *Mazzera v. Wolf* (1947) 30 Cal.2d 531, 535; and 7

Witkin, Summary of Cal. Law (8th ed. 1974) Trusts, § 132, p. 5488.) In that we have concluded that there was no actionable fraud, the trial court properly declined to impose a constructive trust.

For the foregoing reasons, we affirm the judgment entered below.

LUI, J.

We concur:

KLEIN, P.J.

DANIELSON, J.

APPENDIX II.

Memorandum of Decision.

Superior Court of the State of California for the County of Los Angeles.

Jason Phillips and Alma Lyn Phillips, Plaintiffs, vs. Michael J. Howard, Ann Howard, Lucius F. Foster, Lucius F. Foster dba Properties Unlimited, Does 1 through 20, Inclusive, Defendants. No. C 199920.

Filed: May 8, 1981.

The Court finds the following facts to be true concerning the principal issues of the case:

1. The failure of Mrs. Howard to personally sign the change of trustee document did not vitiate the trustee sale as her lack of signature was a technicality only, having no adverse affect on plaintiffs, and that she has ratified the signing of her signature by Mr. Howard. Further, plaintiffs failed to tender any payment of indebtedness to the Howards before seeking to vitiate the sale.

2. Foster was the agent of plaintiffs, but owed a fiduciary duty to plaintiffs and Howards. This agency was for the purpose of refinancing the subject property and thereby saving it from foreclosure.

3. Foster was authorized by Howards to submit a re-finance offer, Exhibit 6. He was not authorized to accept any counteroffer, Exhibit 8, without the express approval of Howards.

4. Plaintiffs rejected Howards' offer. Exhibit 6. Howards rejected plaintiffs' counteroffer, Exhibit 8. There was no meeting of the minds or contract arrangement entered into between plaintiffs and Howards.

5. Michael Howard was aware of the fact that plaintiffs and Foster desired to create a new financing arrangement

to avoid foreclosures. Michael Howard was aware of the terms and conditions contained in Exhibits 6 and 8.

6. After Howards had rejected the counteroffer, Exhibit 8, and prior to the trust deed sale, Michael Howard no longer desired to enter into financing arrangement with plaintiffs, but then desired to purchase the second trust deed for the purpose of acquiring the subject property with the rights of ownership that had vested in plaintiffs.

7. Prior to the trust deed sale, Michael Howard wilfully failed to advise Foster and/or plaintiffs of his change of intentions. This was done for the purpose of facilitating his ultimate acquisition of the property.

8. Prior to the trust deed sale, Foster wilfully failed to advise plaintiffs that no refinancing arrangement had been arrived at with either Howards or anyone. This was done for the purpose of keeping a potential arrangement with Howards or another to refinance the property and save it from foreclosure.

9. The failures of Foster and Michael Howard to disclose information re intentions and/or status of the refinancing arrangements caused plaintiffs to refrain from seeking further or other refinancing to save the said property from foreclosure.

10. Plaintiffs failed to adequately prove any damages as a result of Foster's or Michael Howard's non-disclosure and misleading conduct. The reasonable value of the premises in question did not substantially exceed the liens and/or encumbrances against the property such that any satisfactory refinancing could be had for the premises.

11. No sufficiently clear refinancing understanding or arrangement was arrived at between the Howards and plaintiffs to create any terms or conditions on which the Court can create an equitable mortgage. There was an unequivocal

rejection by both said parties to an equitable mortgage that could be created by the Court.

12. For equitable reasons, an equitable mortgage cannot be created. The Court finds plaintiffs guilty of laches for the period from the initial service of the unlawful detainer action of Howards to the date of filing this action. The Court further finds that plaintiffs were obligated to and failed to offer any reimbursement of trust deed payments made by Howards to the time of filing the action.

13. Mrs. Howard did not wilfully mislead plaintiffs or Foster by actions or failure to disclose.

14. Judgment for defendants plus costs.

DATED: May 8, 1981.

/s/ Charles M. Hughes

CHARLES M. HUGHES

JUDGE OF THE SUPERIOR COURT

APPENDIX III.

Relevant Findings of Fact and Conclusions of Law of the Trial Court.

Findings of Fact

2. On or about August 5, 1975, the reasonable value of the property in question did not substantially exceed the unpaid principal balances of the liens or encumbrances against the property in an amount that any satisfactory or feasible refinancing could be had for the premises.

3. During the period of plaintiffs' ownership, to and including August 5, 1975, the property was encumbered with deeds of trusts, liens, and judgments in the amount of approximately \$85,000.00, including a first trust deed securing a promissory note with an unpaid principal balance of approximately \$63,900.00, a second trust deed securing a promissory note with an unpaid principal balance of approximately \$7,995.00, a third trust deed (also secured by, and subsequently cleared through the sale of, other real property owned by plaintiffs) securing a promissory note with an unpaid principal balance of approximately \$24,255.60, and a pool construction lien contract with an unpaid balance of approximately \$12,152.64.

9. Beginning on or about July 1, 1975, plaintiffs employed defendant Lucius Foster ("Foster") to develop a plan to fulfill their "refinancing" desires.

13. On July 31, 1975, Foster told plaintiffs that defendants would agree to the "refinancing" plan, contained in plaintiffs' Exhibit 6.

14. In preparing Exhibit 6 for presentation to the Philips, Foster and Michael Howard used an option form arrangement for the purpose of avoiding a possible usury problem.

23. After rejecting the refinancing terms contained in plaintiffs' Exhibit 8, defendants did not wish to engage in any "refinancing" arrangement with plaintiffs but desired, instead, to purchase the second trust deed for the purpose of acquiring title to the property as owners thereof. Defendant Howard did not advise either plaintiffs or defendant Foster of his plans to acquire ownership of the property for himself and his wife.

24. Between July 31, 1975 and August 5, 1975, Foster never informed plaintiffs that defendants had rejected the refinancing terms contained in plaintiffs' Exhibit 8, for the purpose of keeping a potential refinancing arrangement with defendants or others alive.

25. Defendant Michael Howard did not inform plaintiffs that defendants rejected the terms of the refinancing plan contained in plaintiffs' Exhibit 8, for the purpose of facilitating his ultimate acquisition of the property.

26. The failures of defendants, Michael Howard and Foster, to inform plaintiffs personally that defendants rejected the "refinancing" terms contained in plaintiffs' Exhibit 8 and/or defendants intentions with respect to acquiring title to the property for their own account, caused plaintiffs to refrain from seeking further or other refinancing to prevent foreclosure of the second trust deed.

27. At no time prior to, nor subsequent to, August 5, 1975, did plaintiffs have the money to pay the liens and encumbrances on the property, or to cure the defaults thereof, or to repurchase the property from defendants on the terms contained in either plaintiffs' Exhibit 6 or Exhibit 8, nor any money under their control, by contract or otherwise, for such purpose.

30. Because of the lack of equity in the property no conventional or satisfactory refinancing of the property was

feasible. Plaintiffs had insufficient assets or cash to cure the defaults prior to any foreclosure or extended foreclosure dates.

31. No "refinancing" agreement, understanding or arrangement was reached between plaintiffs and defendants from which the court can create an equitable mortgage or enforceable option contract.

32. Plaintiffs and defendants mutually and unequivocally rejected any "refinancing" terms from which the court could create an equitable mortgage.

48. At all times on August 5, 1975 Jason Phillips assumed that the sale arranged by Foster, with the concurrence of Michael Howard, was being held as a part of a refinancing plan and he had no knowledge that Michael Howard, with wilful intent, secretly planned on buying the residence for the personal account of he and his wife.

51. Following the trustees' sale on August 5, 1975, the Phillips continued in undisturbed possession of the property until about September 14, 1975 through September 16, 1975 when Michael Howard first advised the Phillips that he owned the residence and he delivered to them a Notice to Quit the premises. Until said date, the Phillips had no indication of the secret reservations by Michael Howard as hereinbefore set forth.

52. At no time during August or September of 1975, or later did the Howards demand or request payment of any sums by the Phillips and commencing about mid September of 1975, the Howards consistently maintained they owned the residence outright.

Conclusions of Law

2. Plaintiffs and defendants never agreed, expressly or impliedly, to any set of terms which would give rise to a loan, an equitable or legal mortgage, or an option contract

between them, of any nature whatsoever.

3. Defendant Ann Howard did not make any misrepresentations to plaintiffs. Defendant Michael Howard made wilful misrepresentations to plaintiffs by failure to advise them of this change of intention from refinancing to acquisition of the property. Defendant Foster failed in his fiduciary duty to plaintiffs by failure to adequately advise them of any lack of refinancing arrangements and in the procurement of the \$1,000 commission which he had not earned.

7. Defendants and Foster did not conspire together to defraud plaintiffs.

8. Defendants do not hold title to the property as involuntary or constructive trustees for plaintiffs.

9. Plaintiffs have no legal or equitable title to the property and defendants are legally entitled to possession thereof.

10. The property was duly sold to defendants in accordance with California Civil Code Section 2924, under a power of sale contained in a deed of trust executed by plaintiffs, and title under the sale was duly perfected by defendants.

11. Plaintiffs are guilty of laches as the result of their inaction subsequent to the sale.

12. In light of plaintiffs' failure to tender any money to defendants in any amount or at all subsequent to the sale, plaintiffs' financial inability so to do and plaintiffs' laches, at all times plaintiffs' remedy at law was adequate and plaintiffs are not entitled to equitable relief.

13. Plaintiffs established no monetary damages proximately caused by defendants' or Foster's action or inaction, or any grounds for the recovery thereof.

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